No. 53

In the Supreme Court of the United States

OCTOBER TERM, 1966

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

C & C PLYWOOD CORPORATION, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR REHEARING

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INDEX

AUTHORITIES CITED

Table of Cases:

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Comes now the C & C Plywood Corporation and respectfully prays the Court to grant a rehearing in this matter.

I.

The decision in this matter warrants a rehearing on several basic and fundamental bases. The first basis results from the absence of any statutory basis upon which the National Labor Relations Board is granted the authority, either directly *or indirectly*, to interpret collective bargaining agreements.

A. What is a violation of the terms of a collective bargaining agreement? A violation of a contract may be a positive act contrary to any of the contract's affirmative or negative terms, a misapplication of any of its provisions or conduct not covered by its terms. It must be assumed that the contract is an embodiment of all of the areas in which the parties directed their negotiations. Such a con-

tract violation is what Congress decided should not come within the purview of the jurisdiction of the Board but should be reserved to the courts. In the case at bar, assuming, *arguendo*, that the Board's interpretation of the labor contract is correct, what is the result? It is most certainly that the employer has violated the terms of the labor agreement, for its conduct does not come within the terms to which the employer sought to apply them. The Respondent does not argue that the Board is without authority in a situation where the interpretation suggested is no more than an obvious sham. But, here we have no sham. Nor does the point here made by the Respondent have any application to a contractual provision which is no more nor less than a repetition of a statutory obligation such as was involved in *Smith v. Evening News Assn.*, 371 U.S. 195 (1962). We are here dealing with a right retained by the Respondent, or granted by the Union, which is spelled out in the contract. If the employer is correct in his interpretation, which he believes firmly, then his conduct is protected by the contract and no violation exists. Thus, the contract, the interpretation applied to it and the conduct are all essential elements of the controversy to be decided. These are the very same necessary elements upon which any litigation involving the violation of the terms of any collective bargaining agreement revolve.

A construction placed upon a contract should be no different whether it is placed thereon in consequence of passing upon statutory obligations or in a determination of the substantive merits of the contractual controversy. To rule otherwise establishes a double standard not warranted under the present posture of our law or this statute. Con-

gress intended that Title I of the Labor Management Relations Act, the National Labor Relations Act, as amended, (61 Stat. 136, 29 U.S.C. 141 *et seq.*) should result in collective bargaining agreements. This decision permits the Board to thwart them.

Congress thoroughly considered giving the Board jurisdiction over the violation of contracts in passing on the Senate version of Section 8(a)(6) and 8(b)(5) but rejected such jurisdiction in favor of leaving such matters to the courts under Section 301.[1] The language of the House Conference Report, at page 42, simply leaves no room for doubt or misunderstanding of Congressional intent with respect to the Board's role in this area:

> "• • • Once parties have made a collective bargaining contract the enforcement of the contract should be left to the usual processes of the law and not to the National Labor Relations Board."[2]

Senator Taft's discussion of the Conference bill, further illustrates this admonition:

> "When the bill passed the Senate it also contained a sixth paragraph in this subsection [Section 8] which made it an unfair labor practice for an employer to violate the terms of a collective-bargaining agreement or the terms of an agreement to submit a labor dispute

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[1]The version of the Senate bill rejected by the Conference Committee contained the following provision:

"Sec. 8(a) It shall be an unfair labor practice for an employer
• • •

"(6) to violate the terms of a collective bargaining agreement or the terms of an agreement to submit a labor dispute to arbitration; • • •" Section 8(b)(5) of the same bill imposed a similar limitation upon labor organizations. S. 1126, 80th Cong. 1st Sess., 1 Legis. Hist. LMRA 109-111, 114.

[2]House Conf. Rept. No. 510, 80th Cong. 1st Sess.; 1 Legis. Hist. LMRA 546.

to arbitration. *The House conferees objected to this provision on the ground that it would have the effect of making every collective bargaining agreement subject to interpretation and determination by the Board, rather than the courts.* The Senate conferees ultimately agreed to its elimination as well as the deletion of a similar provision contained in Section 8(b)(5) of the Senate amendment which made it an unfair labor practice for a labor organization to violate the terms of collective-bargaining agreements. The provisions of the Senate amendment which conferred a right of action for damages upon a party aggrieved by breach of a collective-bargaining contract, however, were retained in the conference agreement (section 301). If both provisions had remained, there would have been a probable conflict of remedies and decisions."[3]

Nothing more is needed to demonstrate that it is not simply an inference, but a clear mandate from Congress that the Board is not to become embroiled in contract interpretation, enforcement or administration. This decision unequivocally contradicts these unmistakable manifestations of Congressional intent.

But we need not stop here to nail down this Congressional intent. Its pervasive intent to keep the Board out of the merits of contending positions in defining the obligation to bargain was underlined in the House Conference Report at page 34 where it is stated:

"• • • Hence, the Senate amendment, while it did not prescribe a purely objective test of what constituted collective bargaining, as did the House bill, had to a very substantial extent the same effect as the House bill in this regard, since it rejected, as a factor in determining good faith, the test of making a concession *and thus prevented the Board from determin-*

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[3] 93 Cong. Rec. 6600; 2 Legis. Hist. LMRA 1539. Emphasis supplied.

ing the merits of the positions of the parties."[4] (Emphasis supplied.)

And at page 35 of that Report:

> "• • • In addition, the conference agreement omits from the Senate amendment words that were contained therein which might have been construed to require compulsory settlement of grievance disputes and other disputes over the interpretation or application of the contract."[5]

Congress plainly did not want the Board meddling in the agreement of the parties. It simply sought to define rules for orderly bargaining in the ultimate aim that a collective bargaining agreement would result. That aim was an accomplished fact in the case at bar.

The purpose of Section 8(a)(5) is good faith collective bargaining. No question has been raised concerning the Respondent's good faith bargaining in reaching the agreement. There are no allegations of any unfair labor practices engaged in by the Respondent which can be separated from its good faith interpretation of the contractual provision relied upon. And, even though the Respondent felt secure in its interpretation, it further adhered to the dictates of the statute by indicating and offering its sincere willingness to fully discuss the premium pay plan and all of its ramifications. It was the Union that maintained an intransigent demand for removal of the plan.

B. A careful examination of the legislative history of the Act creating the Board and of the Act itself fails to disclose any point at which Congress suggested or intended

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[4]House Conf. Rept. No. 510, 80th Cong., 1st Sess.; 1 Legis. Hist. LMRA 538.

[5]House Conf. Rept. No. 510, 80th Cong., 1st Sess.; 1 Legis. Hist. LMRA 539.

that the Board should have a general or special power to interpret, construe or administer labor agreements either directly or indirectly or in the process of passing upon statutory questions excepting only with regard to the specific limitations placed upon "union security" and "hot cargo" provisions.

C. Whether the Board is given the right to interpret labor contracts as an incident to its jurisdiction to enforce statutory rights or it is given the right to determine contractual disputes upon their merits, the result is precisely the same. In either instance the Board has been given the jurisdiction to provide a final and binding disposition of the dispute. Thus, if this decision is permitted to stand, the Court will have as effectively given the Board jurisdiction in the administration of contracts as if Congress had decided to give the Board concurrent jurisdiction with the Courts under section 301, which Congress did not intend and said so. This is true in spite of the approval in this decision of the admonition of Congress that the Board should have no unfair labor practice jurisdiction over breaches of contract.

D. This decision suggests that Congress rejected placing in the Board "unfair labor practice jurisdiction over all breaches of collective bargaining agreements." (Slip Opinion, p. 6) But, this is not the substance of what Congress said. Congress has stated that "the enforcement of the contract should be left to the usual processes of the law and not to the National Labor Relations Board."[6] Enforcement of the contract relates to the entire contract or any part of

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[6]Supra, note 2.

it so that it is equally applicable to any breach as to all breaches of the agreement. The foregoing statement was made by Congress in rejecting the Senate version of the bill which made it an unfair labor practice "to violate the terms of a collective bargaining agreement."[7] Thus, it related to *any* of the terms, not to *all* of them. Senator Taft's discussion of the Conference bill, already quoted, notes that the House made its objections to the Senate version "on the ground that it would have the effect of making every collective agreement subject to interpretation and determination by the Board, rather than the Courts."[8] This refers to "every collective agreement" which inherently includes all of its terms. Thus, it is clear that it is not simply an inference to be drawn from the Act and its legislative history but a mandate of Congress making it clear that the Board was to have nothing to do with contract administration.

E. It is necessary to observe that the fear was that "every collective agreement" would be made subject to interpretation and determination, not "all questions of contract interpretation" as has been indicated by the decision in this matter. (Slip Opinion, n. 13, p. 7) While the courts do not have the authority to enforce the union's statutory rights under sections 8(a)(1) and (5), neither does the Board have the right to enforce the interpretation placed upon a labor agreement by either party thereto. This conclusion is borne out by the foregoing discussion of Congressional intent and the reasons why Congress declined to grant such authority to the Board.

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[7] *Supra*, note 1.

[8] *Supra*, note 3.

The foregoing passages of the law and of its legislative history and those already cited earlier in the proceedings in this matter illustrate positively why Congress did not intend the Board to act in contractual disputes for any reason, statutory or otherwise. On the other hand, neither anything in the Act nor in the legislative history of the Act supports the view that Congress in any way intended the Board to become embroiled in contract administration, directly or indirectly, in the determination of statutory rights.

Since the Board is purely a creature of statute, it is imperative that the statute itself be precise in this area so that those it regulates are fully apprised of their rights and responsibilities if we are to preserve due process. This statute is precise in not incorporating reference to general contract administration as a proper Board function.

F. To permit the decision in this matter to remain would confirm the fears of Congress that a grant of authority to both the Board and to the Courts could well result in conflicting decisions. By such confirmation, this decision is shown to conflict with the well-defined intent of Congress to keep the Board out of the area of contract administration, directly or indirectly. To illustrate this point conclusively, the Respondent employer here is not barred by this decision from seeking a declaratory judgment before the Courts of the interpretation of the controverted contractual provision. It is more than likely—it is probable—that the Respondent's good faith interpretation of the provision involved would be vindicated for a Court, under such circumstances, would not be confused with the "expertise" the Board claims to possess. A Court would in no manner

be bound by the decision of the Board. The result could be exactly the kind of conflicting decisions which the Act was intentionally designed to avoid.

G. To create conflicting decisions, if the case at bar is to stand, the only necessary ingredient is a conflicting view by contracting parties to any provision involving a mandatory subject of bargaining. Very few issues in the formation of a labor contract are not included among the mandatory subjects of collective bargaining. It is actually *impossible* to conceive of *any* contractual provision over which the Board may *not* now, in light of the decision in this case, exercise this ultra-statutory authority to the detriment of the judicial process provided in Section 301 of the Labor Management Relations Act, 1947. A party to a labor agreement may believe in good faith that it has the right to proceed in a given manner under the terms of its agreement, which right it would not have absent the contractual provision. It acts. At the time of its action it may not even know or suspect that the other party to the contract does not agree with its interpretation. The other party, seeking an approval of a contrary interpretation, in reality seeking to obtain a decision on the merits, but recognizing the costs associated with court litigation, or even arbitration where a large expense normally adheres, now seeks out the Board for a total cost of a 5¢ postage stamp. The Board, under the precedent of the case here at bar, if it is left to stand, armed with the authority to interpret a contract, theoretically to enforce a statutory obligation, is free to fully examine the contract and the interpretations placed upon it. Whether it declines to proceed or whether it proceeds to a decision, the Board is in either instance

passing upon the merits of the dispute. If the party relying on the controverted contractual provision is found not to have the protection of that proviso, inasmuch as a mandatory subject of collective bargaining is involved, it is, without more, guilty of a refusal to bargain. And on the other hand, if the Board declines to act, the party involved is still free to go to the Courts for relief. The double jeopardy aspects of this are not to be desired.

If this decision is permitted to stand, even the most cautious party to a collective bargaining agreement or one who seeks to resolve all doubts and obtains a decision of a court affirming the interpretation that he maintains, has no security whatsoever from accusations of a refusal to bargain. The cautious party can go to a court, be affirmed in his interpretation, by a declaratory judgment or otherwise, and the disputing party is free to ignore the decision of the court under the guise of seeking to enforce a statutory right. The interpretation of the court can be effectively set aside because the Board, under the decision at bar, has the right to interpret a contract in the determination of statutory violations. It may be suggested that this prospect is far-fetched for the Board has recognized arbitration decisions which meet certain standards that the Board considers to be essential to a fair disposition of an issue so that such a prospect is unrealistic. But, there is no security in this present rule of the Board for the Board has changed its interpretations and precedent *not once but many times* in its administration of the statute in the over thirty years of its history.[9] No litigant before the

[9]Labor Relations Reporter, Special Supplement to Vol. 61, No. 27, Apr. 4, 1966 entitled Major Labor-Law Principles Established by NLRB and Courts.

Board can rest secure in the continuation of a current Board precedent. A change in personnel or a change in politics results in new rules, new decisions, new viewpoints, and new interpretations that did not exist but a few months, weeks or even days before. The Board's extension of comity to arbitration decisions is no different. It is not based upon a statutory direction requiring the Board to extend comity to arbitration decisions. It is rather based only on the present viewpoint of the present and recent members of the Board. While the statute remains the same, its application to substantially the same factual situations by the Board is *ever changing*.

H. The decision of this Court in *Mastro Plastics Corp. v. NLRB*, 350 U. S. 270 (1956) is clearly distinguishable from the case at bar and does not, in fact, form a precedent applicable to the decision at hand.

1. In *Mastro Plastics* the conduct forming the basis for the unfair labor practice was altogether independent of the contract clause to which reference was made. The conduct, which was found to constitute an unfair labor practice, in no manner relied upon an interpretation of a collective bargaining agreement. The unfair labor practice in *Mastro Plastics* would have existed irrespective of whatever interpretation had been placed upon the contractual provision. In the case at bar, without the interpretation placed upon the terms of the agreement by the Board, there is no unfair labor practice. In the case at bar, the Board engaged in conduct barred by Congress which was to determine the merits of the controversy over the contractual interpretation even though it did so in alleged

pursuit of its statutory authority of determining the existence of an unfair labor practice.

2. The question of the Board's authority to construe collective bargaining agreements where such is necessary to the finding of an unfair labor practice was not raised in the *Mastro Plastics* case as it was in the case at bar. Thus, this Court had no occasion to consider the issue and its decision in that case was not related to the issue involved in the case at hand.

3. In the *Mastro Plastics* case there was a substantial factor of overwhelming public policy, namely, whether or not an employer was to be permitted to engage in flagrant unfair labor practices and then seek to deprive the union involved of its statutory right to protect itself from that activity by a strike. The gravity of the independent unfair labor practices involved in *Mastro Plastics* necessitated a drastic result as a matter of public policy. Such overwhelming considerations of public policy are not here involved. The case at hand is characterized by a total absence of any independent conduct which forms the basis of an unfair labor practice. C & C Plywood believed, in good faith, and on an abundance of valid reason, that the contractual provision involved unequivocally supported the conduct that it undertook.

4. *Mastro Plastics* involved an 8(a)(1), (2) and (3) charge. Section 8(a)(5), which forms the basis for the charge in *C & C Plywood* was not in any manner involved in *Mastro Plastics* while Section 8(a)(2) and (3) are in no manner involved in *C & C Plywood*. The statutory considerations are vastly different. While Section 8(a) (1) was involved in both cases, it rested completely

upon the 8(a)(5) considerations in *C & C Plywood* while there appears to have been unmistakable independent 8(a)(1) violations in *Mastro Plastics*.

I. The decision at hand would appear to overrule *NLRB v. American National Insurance Co.*, 343 U. S. 395 (1952) in which this Court stated:

> "• • • And it is equally clear that the Board may not, *either directly or indirectly* compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." (Emphasis supplied.)

If the decision at bar is to remain, there is no question that the Board may, with impunity under the guise of enforcing statutory rights, "sit in judgment upon the terms" of the collective bargaining agreement here involved.

II.

The references in the opinion to arbitration and the emphasis placed upon its absence as the means of resolution of labor disagreements appears to have been a paramount consideration in the ultimate decision of this Court. (Slip opinion, p. 3, 5) Such consideration was completely and totally foreign to any necessary evaluation or decision in this matter.

A. The separation of the powers as provided for in the Constitution of the United States contemplates that this Court will interpret the law. The issue in the matter here before this Court rests *wholly* upon statutory fiat and in no manner upon the common law. No search need be made into legislative history as to the intent of Congress with respect to the resolution of labor grievances or disputes

over contract interpretations for Congress explicitly stated in Section 203(d) of the Labor-Management Relations Act (61 Stat. 154, 29 U.S.C. Sec. 173(d):

> "Final adjustment *by a method agreed upon by the parties* is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or *interpretation of an existing collective-bargaining agreement.* • • •" (Emphasis supplied.)

The parties here freely and voluntarily chose *not* to include arbitration as the means of ultimately resolving their differences. Having so chosen, the absence of arbitration should not in any manner be a consideration. To say that it is a consideration legislates in a situation where the Court is without authority to legislate and interprets where the resulting interpretation ignores the Statute and its unambiguous provisions.

B. This Court has recognized the policy of Congress as set forth above in *United Steelworkers v. American Manufacturing Co.*, 363 U. S. 564 (1960) wherein at page 566 this Court observed, after quoting from the foregoing legislative passage:

> "• • • That policy can be effectuated *only if the means chosen by the parties* for settlement of their differences under a collective bargaining agreement is given full play." (Emphasis supplied.)

The decision in this case (No. 53) by placing unwarranted emphasis on arbitration would appear to reverse the impact of the *American Manufacturing* decision. This is neither desirable nor proper in view of the clear admonition of Congress.

C. The "therapy of arbitration" encouraged by the majority opinion of this Court in *Carey v. Westinghouse*, 375 U. S. 261, 272 (1964) was applied only after the parties themselves chose that means for the resolution of their disputes and in no way defied "the means chosen by the parties." The same observation is pertinent to *International Harvester Co.*, 138 N.L.R.B. 923 (1962), aff'd *sub nom. Ramsey v. NLRB*, 327 F.2d 784 (CA 7), cert denied, 377 U. S. 1003 (1964). But for an arbitration provision included in each of the labor contracts in each of those cases, the result of those decisions would have been totally different.

D. This decision records as a substantial consideration in rejecting the Respondent's position in this matter the fact that the failure to reach an agreement might result in a strike, i.e., "economic warfare." (Slip Opinion, p. 5) Yet, when Congress faced this problem it gave full protection to the freedom to strike. Senator Taft made this abundantly clear at the time of the vote to override the veto when he said:

> "Mr. President, we have drafted this bill and it is based on the theory of the Wagner Act, if you please. It is based on the theory that the solution of the labor problem in the United States is free, collective bargaining —a contract between one employer and all of his men acting as one man. That is the theory of the Wagner Act, that they shall be free to make the contract they wish to make.
>
> "Many people have felt that the Government should come in certain cases and impose compulsory arbitration in the fixing of wages, if the parties cannot agree. Our provision for dealing with Nation-wide strikes has been criticized. After 60 days, if they still want to vote for a strike, we have not forbidden it, *because we believe that the right to strike for hours, wages and work-*

ing conditions in the ultimate analysis is essential to the maintenance of freedom in the United States. We have rejected every effort to impose upon any men any wages, hours, or working conditions to which they, through their representatives, do not agree.

"• • • *I think our freedom depends upon maintaining the free right to strike.*"[10] (Emphasis supplied.)

The Conference Report also emphasizes the freedom of the parties in the area of disputes settlements and the total unimportance of arbitration as a factor in legal rights of the parties. At page 62, the Report, in discussing the functions of the Federal Mediation and Conciliation Service, and after noting that a Senate amendment urging voluntary arbitration of labor disputes was rejected, continued:

"• • • The conference agreement, in section 203, does not mention arbitration as such but provides that if the parties cannot be brought to settlement by conciliation and mediation the Service shall seek to induce them voluntarily to seek other means of settling the dispute without resort to strike, lock-out, or other coercion. *The failure or refusal of either party to agree to any procedure suggested by the Director is not to be deemed a violation of any duty or obligation imposed.* • • •."[11] (Emphasis supplied.)

This illustrates: (a) that Congress did not intend compulsory arbitration to be a consideration in the industrial relations philosophy of this Nation; (b) that the right to strike was to remain unimpaired; and (c) that that policy

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[10]93 Cong. Rec. 7690; 1 Legis. Hist. LMRA 1653. Congressional intent rejecting compulsory arbitration throughout this legislation is also indicated at 93 Cong. Rec. A896, 3952, 5297; 2 Legis. Hist. LMRA 937, 1008, 1520.

[11]House Conf. Rept. No. 510, 80th Cong., 1st Sess.; 1 Legis. Hist. LMRA 566.

should remain so long as the parties to a contract did not freely agree otherwise. In the present case the parties were thoroughly familiar with arbitration and weighed its merits and pitfalls. To them the disadvantages, and there are many, far outweighed the merits. As a result they chose to settle their differences through negotiations and free collective bargaining. This is not contrary to any federal labor policy. Instead it is in complete harmony with the intent of Congress as reflected in the Labor Management Relations Act and its legislative history. It is simply beyond any consideration that this Court should have interjected this subject into this decision and it is incumbent upon this Court to remove this impediment rejected by Congress. In doing so, it should also remove the thrust of this decision which, irrespective of the angle of examination, places the Board in the position of the compulsory arbiter of contractual interpretations under the subterfuge of ruling upon statutory application.

E. By placing the emphasis that this decision does upon arbitration, the Court substitutes its judgment for the judgment of the parties and in fact subverts the "Act's clear emphasis upon the protection of free collective bargaining" one of the legs alleged to support the Board's decision. (Slip opinion, p. 9) "Free collective bargaining" is exactly the base upon which the relationship between the parties was here involved. The parties voluntarily chose not to substitute the judgment of an arbitrator for their own judgment. Instead they chose to utilize the other techniques of free collective bargaining many of which are far superior in actual practice to the use of arbitrators, unskilled in industrial problems, who are not required to

live with the consequences of their decisions and whose decisions are not subject to appeal to correct errors.

III.

Another basic and fundamental aspect, separately and distinctly, warranting rehearing, is that portion of the pending decision in this matter which accepts the strained and unwarranted interpretation placed upon the provision of the collective bargaining agreement under consideration.

A. The Respondent respectfully points out that the Opinion errs in accepting the Board's interpretation. That acceptance is stated:

> "In reaching this conclusion, the Board relied upon its *experience* with labor relations *and* the Act's clear emphasis upon the protection of free collective bargaining. We cannot disapprove of the Board's approach." (Slip opinion, p.9; emphasis supplied.)

It is urged that the Board's experience is not an acceptable substitute for a preponderance of the testimony or substantial evidence in the record of this particular proceeding. Section 10(c) of the National Labor Relations Act, as amended, is careful to point out:

> "* * * *If upon the preponderance of the testimony taken* the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall * * * * * * *If upon the preponderance of the testimony taken* the Board shall not be of the opinion * * * * * * *" (Emphasis supplied.)

Section 10(e) of the amended Act provides with respect to proceedings before the courts on Board orders:

> "* * * The findings of the Board with respect to questions of fact *if supported by substantial evidence*

on the record considered as a whole shall be conclusive. * * *" (Emphasis supplied.)

The Board has imposed its own view of what the terms and conditions of the labor agreement should be contrary to the evidence and testimony herein. A careful examination of the record of these proceedings fails to come up with one iota *of evidence or testimony* to support the Board's conclusion that:

> "* * * To accept Respondent's construction is tantamount to saying that the Union inferentially surrendered to Respondent the right unilaterally to establish production standards and wage rates based thereon as a method of compensating employees. *Such an intent is so contrary to labor relations experience that it should not be inferred* unless the language of the contract or the history of negotiations clearly demonstrates this to be a fact. * * *" (R. 99; emphasis supplied.)

B. There is absolutely no shred of evidence or testimony in these proceedings to bear out the Board's conclusion. It is simply not due process of the law to find that one is confronted with a decision based upon a conclusion concerning which no evidence or testimony was introduced in the trial on its merits.

The Respondent is not granted the protection of due process of law when a decision turns upon considerations of fact that are not in evidence nor indicated precisely in the pleadings. How can one defend oneself under circumstances such as these?

C. In amending the provisions of Section 10(c) and 10(e) cited above, in 1947, Congress sought to avoid the very situation which has evolved and is accepted in this decision. Congress not once, but on innumerable occasions,

in amending the Act, sought to destroy once and for all the acceptance of the notion of Board "expertness" in the field of labor relations which could be substituted for evidence. The House Conference Report at page 56 states:

> "• • • In many instances deference on the part of the courts to specialized knowledge that is supposed to inhere in administrative agencies has led the courts to acquiesce in decisions of the Board, even when the findings concerned mixed issues of law and of fact (*N.L.R.B. v. Hearst Publications, Inc.*, 322 U. S. 111; *N.L.R.B. v. Packard Motor Car Co.*, 330 U. S. 485), or when they rested only on inferences that were not, in turn, supported by facts in the record (*Republic Aviation v. N.L.R.B.*, 324 U. S. 793; *Le Tourneau Company v. N.L.R.B.*, 324 U. S. 793).
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> "As previously stated in the discussion of amendments to section 10(b) and section 10(c), by reason of the new language concerning the rules of evidence and the preponderance of the evidence, *presumed expertness on the part of the Board in its field can no longer be a factor in the Board's decisions.* • • •" (Emphasis supplied.)[12]

At page 53 of that Report it is observed:

> "• • • If the Board is required, so far as practicable, to act only on legal evidence, the substitution, for example, of assumed 'expertness' for evidence will no longer be possible. The conference agreement in section 10(c) contains this provision of the House bill."[13]

At page 54 the following passage is found:

> "• • • Making the 'preponderance' test a statutory requirement will, it is believed, have important effects. For example, evidence could not be considered as meeting the 'preponderance' test merely by drawing

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[12]House Conf. Rept. No. 510, 80th Cong., 1st Sess.; 1 Legis. Hist. LMRA 559-560.

[13]Supra, note 12 above at p. 557.

of expert inferences therefrom, where it would not meet the test otherwise. * * *"[14]

And at another point on page 56 of that Report:

"* * * The language also precludes the substitution of expertness for evidence in making decisions. It is believed that the provisions of the conference agreement relating to the courts' reviewing power will be adequate to preclude such decisions as those in *N.L.R.B. v. Nevada Consol. Copper Corp.* (316 U. S. 105) and in the *Wilson* [*Wilson & Co. v. NLRB*, 128 F.2d 114 (1942)], *Columbia Products* [*NLRB vs. Columbia Products Corp.*, 141 F.2d 687 (1944)], *Union Pacific Stages* [*NLRB v. Union Pacific Stages, Inc.*, 99 F.2d 153 (1938)], *Hearst* [*supra*], *Republic Aviation* [*supra*], and *Le Tourneau* [*supra*], etc., cases, *supra* without unduly burdening the courts. The conference agreement therefore carries the language of the Senate amendment into Section 10(e) of the amended act."[15]

There is no difference between an assertion of an "experience" that is superimposed upon a case in lieu of evidence and testimony and the "expertness" examined and rejected by Congress in the 1947 amendments.

The Board is in no way the human embodiment of an ancient wisdom which extends simultaneously on the same terms or logic to all industrial settings or situations. What expertise or experience might indicate is standard or accepted in one industry may be quite foreign to another. Methods of bargaining, meaning to be attributed to contractual terms and provisions, and related considerations are always a function of the specific psychological, economic, sociological, political (for the union is an undeniably political institution) and very often, geographic fac-

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[14] *Supra*, note 12 above at p. 558.

[15] *Supra*, note 12 above at p. 560.

tors which compose the total bargaining context. To generalize to the timber industry an "expertise" derived from the transportation industry, for example, or the automotive industry, is to engage in illusion. For the Board to state, categorically, that the Employer's contentions here are contrary to industrial relations experience is tantamount to an admission by the Board that its industrial relations experience is at best confined, and at worst, non-existent. For such a claim is contradicted by every shred of objective evidence contained within the record of this case. It flies directly in the face of overwhelming evidence of the normality of such an industrial relations experience at this time, in this place, with respect to this union, and the employees encompassed by this union's organizational reach. What is contrary to the industrial relations experience of this group of employees, in this industry, in this region, at this time, is the Board's interpretation of it. The Board suffers from an ideological perspective of what ought to be, not what is. This is hardly a fitting conveyance by which this Court should transport itself along the way of rational decision.

D. The Opinion here suggests that the Court of Appeals did not reach the question of Respondent's interpretation of the collective bargaining agreement provision involved. (Slip opinion, p. 4) The Court of Appeals was obviously not compelled to a conclusion concerning the contract itself in view of its belief that the Board was without jurisdiction in the first instance. However, the Court of Appeals did not fail to pass a judgment on the Board's interpretation, observations that this Court is urged to carefully review. The Court of Appeals observed:

"• • • Indeed, the Board majority 'construed' the contract by looking back to negotiations presumably merged in the agreement, as well as to the provisions of the agreement itself, and by considering also the fact that the union made 'prompt protest' against respondent's action, admittedly taken under what respondent conceived to be a proper interpretation of the agreement.

"We note, moreover, that the rationale of the Board majority, in construing the contract as it did, was as unique as it was circuitous. The course of reasoning was that the provisions of the collective-bargaining agreement are 'so contrary to labor relations experience' that the union should never have executed such a contract; and since the provisions in question should never have been agreed to by the union, it must be presumed that the union did not intend them, since the union's 'prompt protest against Respondent's posting of the new wage schedule . . . belies any such intent'." (351 F.2d 224 at 227; R. 109-110)

The Court of Appeals' disposition of the Board's interpretation is certainly without doubt in the following reference:

"Here, as in *N.L.R.B. v. Nash-Finch Co.*, 211 F.2d 622 (8th Cir. 1954):

> 'It seems to us that what the Board has done, under the guise of remedying unfair labor practices, is to attempt to bestow . . . benefits which it believes the Union should have obtained but failed to obtain . . . as a result of its collective bargaining with the respondent . . .' 211 F.2d at 627" (351 F.2d 244 at 228; R. 41)

E. The promptness with which one files an unfair labor practice charge, a lawsuit, or contests an interpretation made by another is in no manner probative of the correctness of the cause or of the interpretation. Yet, this is one of the precise elements upon which the Board based its judgment concerning the Respondent's contractual interpretation. (R. 99)

IV.

There can be no argument. The issue between the Respondent and the Union was whether or not the Respondent could unilaterally grant premium pay to "any particular employee" based upon the production of a group of employees under the provisions of the labor agreement between the parties, the pertinent portion of which stated:

> "The Employer reserves the right to pay a premium rate over and above the contractual classified wage rate to reward any particular employee for some special fitness, skill, aptitude or the like." (R. 67-8)

Irrespective of the direction from which this issue is considered, the arbiter of the issue is squarely faced with whether or not the interpretation placed upon that provision is valid. Should we argue that the assertion of the privilege of establishing the premium pay plan here involved was pure sham, then the issue involved does not in fact require an interpretation of the labor contract and we thereafter confront a totally different issue, namely whether or not the residual rights of management or management prerogatives permit the employer inauguration of such a plan under the facts of this case. But, there is no necessity to argue or consider residual rights of management or management prerogatives because the interpretation placed upon the agreement by the Respondent was correct and proper.

This Court seems to have misunderstood both the Court of Appeals and this Respondent on the usage of the term that the Respondent "might" have been allowed to institute the premium pay plan under the provision in question or that the provision "arguably" supported the Respondent's interpretation. (Slip Opinion, pp. 4-5) Neither usage was intended to imply that the Respondent had any doubt of

the validity of its position. The qualification was used to encompass an even broader scope than was necessary. The Court of Appeals' view has been developed in the page or two preceding this one and the Respondent's view is made certain here.

The Respondent's right to rely on that language for the plan that was adopted is supported by *any one* of the following approaches to this matter:

1. The language used; in its ordinary meaning, without resort to parole evidence supports the interpretation. The premium rate involved is "over and above the contractual classified wage rate." Thus, the premium is completely discretionary except that it must exceed the agreed upon classified wage rate. The premium is left wholly to the Respondent since it is reserved as a right by the Employer. The purpose of the premium rate is to reward any particular employee for some special fitness, skill, aptitude or the like. The contractual rates paid were $2.29 per hour for the Core Layer, $2.24 per hour for the Core Feeders and $2.15 per hour for the Sheet Turner. The customary lay-up crew consisted of one each of a Core Feeder and Sheet Turner and two Core Layers, one of which actually laid core at any one time while the other worked with the Sheet Turner as the second Sheet Turner. The Core Layers exchanged duties periodically. The skills and responsibilities involved in these various jobs in the usual course of activity were obviously not the same for each was paid a different rate. However, the premium pay plan inaugurated by the Employer provided that all three would be paid at the same rate when a certain norm of production was reached. The ultimate premium was paid only to a

single employee in his pay check. It was not paid to the group and then shared by them. Thus, in the simplest of terms the premium pay was paid to particular employees and certainly satisfied the terms of the premium pay reserved right given the Respondent in this contract. But, if more is needed, the very fact that all were paid the same rate if the required norm was exceeded illustrates the particularity of payment even further. The Respondent's General Manager, who developed this plan, was cognizant of all of the intricacies of work of each member of the lay-up crew. The Respondent was satisfied the degree of added fitness, skill, aptitude or the like was greatest for the Sheet Turner so his reward was greater than the others. On the other hand, the difference between the factors upon which the Core Feeder and Core Layers were paid in their regular rate and that degree of these factors required to attain the norm was less than that required of the Sheet Turner. The differences of those factors required between the Core Layer and the Core Feeder were also reflected.

The fact that the group was required to work together was totally immaterial. Modern technology which employs the production line system, as does the plywood industry and this Employer makes it literally impossible for any employee to be paid a premium without his meshing his fitness, skill, aptitude or the like with those employees responsible for getting the item upon which he works to him and upon taking the item upon which he works away from him. To deny that the portion of the contract here involved covers the plan established by the Respondent is to go a long ways towards nullifying this clause for many jobs

employed in a plywood plant which require comparable treatment to that applied in the instant case.

2. The foregoing illustrates the common sense application of the provision involved in the posture of this case. But if more is needed, we but ask ourselves what does anyone do when he has any doubt of the meaning of terms? The answer is to search out a reputable dictionary, as have the Courts from time to time. Thus, while we do not believe that resort to a dictionary is necessary to support the Respondent's application of the clause, an examination of it demonstrates without equivocation that the application given to the words here by this Respondent reconcile themselves perfectly with standard dictionary usage. A "premium" contemplates "production above a specified amount"; "fitness" includes "the ability to adjust with others, the capability of adaptation or adjustment"; "skill" is the "ability to use one's knowledge effectively and readily in execution or performance; technical expertness; proficiency"; "aptitude" is defined to be "readiness in learning"; "general fitness or suitableness" or the "natural disposition or tendency to a particular action or effect"; and "or the like" includes additional, similar, or the same kind as that referred to initially. The word "particular" "relates to a part or portion of anything" "of or pertaining to a single person, class, or thing; not general; not common."[17]

The pay ultimately rewarded was particular to an employee here as is evidenced by the difference in the amount of the premium involved and in the fact that each employee's pay is separate from all other employees' pay. Thus, the application of the provisions of the contract under con-

[17]All definitions are found in *Webster's New International Dictionary* (2nd ed., Merriam Co., 1955)

sideration by the Respondent also fulfills the dictionary definitions which contemplates the usual and common usages applied to the words of a language.

3. The Opinion suggests that the fact that the premium involved in this matter leveled contractual wage differentials was a factor bringing about the result here. (Slip Opinion, p. 10) This reasoning fails to recognize that (a) the fact that the premium was more than the contractual wage rate is all that is required to establish the existence of a "premium," and (b) by the very nature of the differences that go into the various facets necessary to the satisfactory performance of any job, the force of the factors necessary to rise above satisfactory performance to a premium norm varies from job to job so that if the ultimate premium rate of several jobs develops uniformity it in no way derogates the existence of the "premium" in the first instance. Finally, we simply cannot bring ourselves to believe that the Court meant to say that had the premium rates for each of these employees not leveled the rate paid each when the premium became applicable, the Respondent's plan would have been found acceptable.

4. The Opinion suggests that "the law of labor agreements cannot be based upon abstract definitions unrelated to the context in which the parties bargained." (Slip Opinion, pp. 9-10) The fact that the negotiators assisting the Respondent and the Union were familiar with comparable language in sister union contracts in the same geographic area illustrates that the language had a known and accepted meaning *to these parties*. The meaning conformed to the interpretation made by the Respondent. Neither party at the time their contract was developed relied upon the "ex-

perience" of the Board. The evidence and testimony concerning other existing plans was introduced into evidence at the hearing in this matter made that evidence probative while nothing within the record of these proceedings supports the "experience" upon which the Board relies.

5. Both parties to the negotiations that culminated in the labor contract here involved were fully aware of the two other premium pay plans which were introduced into the evidence of this matter with considerable specificity. The Respondent did not believe that it would be necessary to go beyond the language of the agreement itself to sustain its position. If it had felt this need, it surely would have developed in evidence other comparable premium pay plans in the same geographic area with sister local unions which were simply alluded to in passing in the evidence at the hearing. (R. 17-18) The note 17 at page 10 of the slip opinion indicates a failure to grasp the full significance of the other plans and their corroboration of the Respondent's interpretation in the case at bar. An analysis of the Mount Lolo Lumber Company plan, for example, bears this out. The contract language of the Mount Lolo premium plan corresponds in essentials to that of the plan at C & C Plywood. Mount Lolo was permitted to pay a higher rate "to reward a *particular* employee for some special fitness, skill, aptitude, or the like." Mount Lolo employed three different car loading crews of two men each. When a given crew exceeded a Company-established production norm, the crew received a premium rate. Some crews qualified, others did not. The premium could only be earned by the combined production effort of the two employees working together in the same crew. The plan

was in existence long before the C & C contract was first negotiated. There have been no complaints about it from the union involved whose representatives are fully aware of it. The Mount Lolo plan was known to and approved by a sister local union to the one representing C & C employees, one of whose representatives is the chief negotiator and one of the business agents of both unions. The great significance of the fact that the joint effort of two men in a crew was daily interpreted and accepted by the union as fully consistent with the language relating to a "particular" employee cannot be overlooked. It is also well to note that the ultimate amount of the premium paid to the two car loaders was the same amount, and resulted in the same pay level, and was thus identical to the premium pay plan which applied to the two Core Layers who periodically exchanged between functions of Core Layer and Sheet Turner at C & C. The plans at the two Companies had a further fundamental similarity in that some crews at both Companies (i.e., glue spreader crews at C & C Plywood, composed of four particular employees, and car loading crews at Mount Lolo, composed of two particular employees), did not qualify for premium pay and were as a consequence paid the contract rate for their jobs. Thus the main features of the two plans and the application given the words of each of these contract clauses are identical.

6. If this decision is to stand, just what has happened to the sanctity of contract? It is fundamental to protect the contract of the parties and to extend to it such reasonable interpretations and effectuations as will encourage and preserve contracts. If this Respondent cannot rely upon

its contract here for what it has done, who will be next to take what appears to be a completely unambiguous contractual provision to the Board to obtain an application of the Board's special "experience" with labor relations? One obvious consequence of this decision will cause employers and unions to bring more and more language specialists to the bargaining table which will simply impede and frustrate the objective of free collective bargaining. No better example can come before this Court than the one here at bar in which it is the contractual interpretation and absolutely nothing else which is the basis for the unfair labor practice finding.

7. The Trial Examiner, who had the opportunity to view the witnesses and form judgments based on the live presentation and not from the cold record, observed:

"General Manager Thomason's decision—so far as the record shows — was consciously reached within the framework of his firm's contract, as he construed it, and did not reflect a deliberate attempt to modify or terminate it. * * *" (R. 92) The Trial Examiner concluded:

> "* * * Though Respondent's management, clearly, refused to concede any lack of propriety or justification with respect to the firm's promulgation of the disputed premium pay plan, spokesmen for the Company made manifest, throughout, their readiness to negotiate regarding the specific terms and conditions under which premium pay would be awarded workers on glue spreader crews. Representatives of the Charging Party, however, made no effort to bargain regarding the plan's content. With matters in their present posture, therefore, Respondent cannot be found in default—upon this ground either—with respect to its statutory obligation to bargain." (R. 93)

It is not reasonable that the Board should be permitted to set aside the findings of the facts of its Trial Examiner and substitute its highly conjectural "experience with labor relations."

V.

This decision suggests that simply because relief might be more speedily obtained from the Board, such a consideration supports the Board's otherwise unwarranted assertion of jurisdiction here. (Slip Opinion, p. 8) Speed of relief is not the test of Board jurisdiction in this or any comparable case. Nothing in the Statute supports the conclusion that the Board is free to interject itself or offer its services based only upon its ability to grant speedy relief.

"Speed of relief" in the resolution of disputes is a characteristic and primary justification for autocracy or despotism. Industrial despotism is not permitted the Board by Congress nor should it be superimposed by this Court on the basis of any such flimsy rationale as the "speed of relief" which is thereby "gained." For the alleged "gain" is no gain at all, but an unretrievable loss of freedom "guaranteed" by Congress in the area of collective bargaining.

Additionally, it is error to believe that the Board does offer speedy relief. Time and again cases can be cited that illustrate that the Board itself engages in inordinate delays. A recent example gained considerable notariety in a situation in which the Board's General Counsel "sat" on a case for a period of fifteen months. (See *Bryant Chucking Grinder Co.*, 160 NLRB No. 125 decided by the Board on October 4, 1966, involving a charge of unfair labor practices filed January 3, 1963. A complaint was not issued until June 5, 1964 after the matter sat on the General

Counsel's desk for 15 months. The elapsed time from filing of charge to decision by the Board was three years and nine months compared to the case at bar requiring three years and five months from filing of charge, through to a decision in this Court. While the Annual Report of the NLRB for fiscal 1966 should be forthcoming shortly we cannot find that it has been issued. However, the Board's Annual Report for fiscal 1965 indicates at p. 11 that the median time consumed from filing charges to the issuance of a complaint was almost two months, specifically 59 days. The Annual Report fails to disclose the median time involved from the date of the issuance of the Complaint to the Trial Examiner's decision or the time involved from the date of that decision to the decision of the Board. Respondent is convinced that if those figures were available it would be much easier to see that speedy justice may be obtained with no less than equal facility by proceeding to court as to the Board.)

VI.

The Court has concerned itself with whether or not the Union had a remedy at law or elsewhere. (Slip Opinion, n. 15, p. 8) The lack of an adequate remedy before another agency or the courts does not vest the Board with authority to act since the Board is the statutory creature of Congress and its authority must be found specifically, not inferentially, in the statute under which it was created and exists. The statute at no point suggests that the Board should have equity jurisdiction or authority to act in the absence of a satisfactory remedy elsewhere.

However, the Union in this matter had available to it any number of adequate remedies for questioning the interpretation taken by the employer, which was the fundamental issue bringing this matter about. These alternates were:

1. It could have proceeded in Federal Court under the provisions of Section 301. The necessity for damages is not a consideration. If the Union was sincere in its disagreement over the interpretation of the agreement and was representing the wishes of the employees it represented at C & C Plywood, the relief of a declaratory judgment would have been adequate. (The reference in the note by which this Court questions whether such a suit would be maintainable is puzzling. Respondent believes such to be the case, but even so that does not vest the Board with jurisdiction.) A total lack of any independent employer unfair labor practices or employer anti-union animus has characterized this case. Thus, it does not follow that the Union's status as bargaining representative was damaged at all.

2. It could have proceeded in State Court claiming a contract violation.

3. It could have sought the intervention of the Federal Mediation and Conciliation Service as indicated in Title II of the Labor Management Relations Act, 1947. This was the means selected by the parties by which "any dispute or grievance" that might "arise under [their] Agreement" was to be settled, if possible, short of a strike. The Union failed and refused to follow this procedure. As a consequence it did not come to the Board in good faith. (See Articles V and VI of the Labor Contract; R. 64-65)

4. It could have sought the assistance of the State of Montana mediation facilities. Either this solution or the solution outlined in the preceding paragraph would have pursued the basic philosophy of free collective bargaining enunciated by Congress where the parties were directed to settle their own disputes in a lasting and satisfactory manner.

5. It could have been urged that this matter be submitted to arbitration on an *ad hoc* basis.

6. It could have pressed its point further in collective bargaining under the grievance procedure. An examination of the record will show that the Union chose simply to insist on the withdrawal of the premium pay plan rather than to discuss the plan itself or to attempt any one of a number of other solutions.

7. It could have awaited the end of the current term of the labor agreement and sought an acceptable revision of the contract.

8. After pursuing the grievance procedure to its end, it could have struck.

The fact that the grievance procedure may ultimately result in economic warfare is not in conflict with the stated intent and purpose of the Congressional policy reflected in the labor legislation of this nation and that fact has been emphasized. Congress considered and rejected a national labor policy based upon compulsory arbitration. Congress recognized the right to strike and chose not to eliminate that ultimate means of resolution of labor problems.

VII.

While rehearing is understandably granted but rarely, the compelling circumstances in this case are myriad. The decision is based upon not one but innumerable erroneous assumptions and premises and imposes a pandora's box filled with potential industrial relations chaos. This decision sets the stage for an unprecedented industrial relations despotism, set within the context of a benign, "impartial" administrative agency which daily stands revealed as the creature of the ebb and flow of political current.

The decision of this Court, in fact, creates a national system of compulsory arbitration in total disregard of the actual will of Congress. This is the essence of this case, if it is not overturned. The Board is given the power to interpret contracts in cases which "may" involve statutory questions. But practically everything within a labor contract involves "statutory" questions. And, there is little to prevent the Board from considering new matters as involving "statutory" questions for it is the Board which is primarily empowered to interpret and administer the Act. The myriad gyrations of the Board, assuming new responsibility and changing precedents and policies at will, has already had an unsettling effect on our industrial society which will be compounded if the decision in this matter is not set aside.

The possibility of an industrial relations despotism which inheres in this decision has a potential of undermining and ultimately destroying the fundamental structure of free collective bargaining in a free society. No free system of

bargaining can endure which relies upon compulsory arbitration. It is not believed that this Court intended to alter the existing industrial relations system in such a radical fashion.

Independently, the Board's substitution of an illusive experience or expertness for evidence in the record is neither due process nor conduct permitted the Board within the purview of its statutory authority. The Board's interpretation placed upon the contract of the parties is so untenable as to be ludicrous.

It is respectfully urged that this matter should be completely and thoroughly re-examined and this decision set aside, reversed and rewritten.

VIII.

This Petition for Rehearing should be granted.

Respectfully submitted,

GEORGE J. TICHY
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Spokane, Washington 99204

CERTIFICATE OF COUNSEL

I certify that this petition is presented in good faith and not for delay.

GEORGE J. TICHY

January 31, 1967

SUPREME COURT OF THE UNITED STATES

No. 53.—October Term, 1966.

National Labor Relations Board, Petitioner, *v.* C & C Plywood Corp.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[January 9, 1967.]

Mr. Justice Stewart delivered the opinion of the Court.

The respondent employer was brought before the National Labor Relations Board to answer a complaint that its inauguration of a premium pay plan during the term of a collective agreement, without prior consultation with the union representing its employees, violated the duties imposed by §§ 8 (a)(5) and (1) of the National Labor Relations Act.[1] The Board issued a cease-and-desist order, rejecting the claim that the respondent's action was authorized by the collective agreement.[2] The Court of Appeals for the Ninth Circuit refused, however, to enforce the Board's order. It reasoned that a provision in the agreement between the union and the employer, which "arguably" allowed the employer to institute the premium pay plan, divested the Board of jurisdiction to entertain the union's unfair labor practice charge. 351 F. 2d 224. We granted certiorari to consider a substantial question of federal labor law. 384 U. S. 903.

In August 1962, the Plywood, Lumber, and Saw Mill Workers Local No. 2405 was certified as the bargaining

[1] National Labor Relations Act, as amended, §§ 8 (a)(5) and (1), 61 Stat. 140–141, 29 U. S. C. §§ 158 (a)(5) & (1) (1964 ed.).

[2] The NLRB's order directed respondent to bargain with the union upon the latter's request and similarly to rescind any payment plan which it had unilaterally instituted.

representative of the respondent's production and maintenance employees. The agreement which resulted from collective bargaining contained the following provision:

"Article XVII

"WAGES

"A. A classified wage scale has been agreed upon by the Employer and Union, and has been signed by the parties and thereby made a part of the written agreement. The Employer reserves the right to pay a premium rate over and above the contractual classified wage rate to reward any particular employee for some special fitness, skill, aptitude or the like. The payment of such a premium rate shall not be considered a permanent increase in the rate of that position and may, at the sole option of the Employer, be reduced to the contractual rate . . ."

The agreement also stipulated that wages should be "closed" during the period it was effective[3] and that neither party should be obligated to bargain collectively with respect to any matter not specifically referred to in the contract.[4] Grievance machinery was established, but

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[3] "ARTICLE XVII

". . . .

"B. It is mutually agreed that the attached classified wage scale shall be effective upon the signing of this Working Agreement with wages closed for the term of that agreement. . . ."

[4] "ARTICLE XIX

"WAIVER OF DUTY TO BARGAIN

"The parties acknowledge that during negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter of collective bargaining, and that the understanding and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Employer

no ultimate arbitration of grievances or other disputes was provided.

Less than three weeks after this agreement was signed, the respondent posted a notice that all members of the "glue spreader" crews would be paid $2.50 per hour if their crews met specified biweekly (and later weekly) production standards, although under the "classified wage scale" referred to in the above quoted Art. XVII of the agreement, the members of these crews were to be paid hourly wages ranging from $2.15 to $2.29, depending upon their function within the crew.[5] When the union learned of this premium pay plan through one of its members, it immediately asked for a conference with the respondent. During the meetings between the parties which followed this request, the employer indicated a willingness to discuss the terms of the plan, but refused to rescind it pending those discussions.

It was this refusal which prompted the union to charge the respondent with an unfair labor practice in violation of §§ 8 (a)(5) and (1). The trial examiner found that the respondent had instituted the premium-pay program in good-faith reliance upon the right reserved to it in the collective agreement. He, therefore, dismissed the complaint. The Board reversed. Giving consideration to the history of negotiations between the

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and Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right and each agree that the other shall not be obligated to bargain collectively with respect to any subject matter not specifically referred to or covered in this Agreement, even though such subjects or matters may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement."

[5] Workers in the three job classifications comprising the glue spreader crews were to receive the following wages:

Core Layer	$2.29/hour
Core Feeder	$2.24/hour
Sheet Turner	$2.15/hour

parties,[*] as well as the express provisions of the collective agreement, the Board ruled the union had not ceded power to the employer unilaterally to change the wage system as it had. For while the agreement specified different hourly pay for different members of the glue spreader crews and allowed for merit increases for "particular employee[s]," the employer had placed all the members of these crews on the same wage scale and had made it a function of the production output of the crew as a whole.

In refusing to enforce the Board's order, the Court of Appeals did not decide that the premium-pay provision of the labor agreement had been misinterpreted by the Board. Instead, it held the Board did not have jurisdiction to find the respondent had violated § 8 (a) of the Labor Act, because the "existence . . . of an unfair labor practice [did] not turn entirely upon the provisions of the Act, but arguably upon a good-faith dispute as to the correct meaning of the provisions of the collective bargaining agreement . . . ." 351 F. 2d, at 228.

The respondent does not question the proposition that an employer may not unilaterally institute merit increases during the term of a collective agreement unless some provision of the contract authorizes him to do so. See *NLRB* v. *J. H. Allison & Co.*, 165 F. 2d 766 (C. A. 6th Cir.), cert. denied, 335 U. S. 814. Cf. *Beacon Piece Dye-*

[*] The trial examiner found that "quite some time prior" to the execution of the contract, the respondent's general manager had proposed an "incentive bonus system" within the department where the glue spreader crews worked. The union's representative, however, declared that the union would not agree to such a plan. Sometime later in the negotiations, the respondent again made reference to the fact that it was "giving thought" to incentive pay, but the trial examiner was unable to conclude that this reference was related to the premium pay provision that eventually appeared in the contract.

ing Co., 121 N. L. R. B. 953 (1958).[7] The argument is, rather, that since the contract contained a provision which *might* have allowed the respondent to institute the wage plan in question, the Board was powerless to determine whether that provision *did* authorize the respondent's action, because the question was one for a state or federal court under § 301 of the Act.[8]

In evaluating this contention, it is important first to point out that the collective bargaining agreement contained no arbitration clause.[9] The contract did provide grievance procedures, but the end result of those procedures, if differences between the parties remained unresolved, was economic warfare, not "the therapy of arbitration." *Carey* v. *Westinghouse Corp.*, 375 U. S. 261, 272. Thus, the Board's action in this case was in no way inconsistent with its previous recognition of arbitration as "an instrument of national labor policy for composing contractual differences." *International Harvester Co.*, 138 N. L. R. B. 923, 926 (1962), aff'd *sub nom.*, *Ramsey* v. *NLRB*, 327 F. 2d 784 (C. A. 7th Cir.), cert. denied, 377 U. S. 1003.[10]

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[7] For illustrations of the limited discretion which the Labor Act allows employers concerning the wages of employees represented by certified unions, see *NLRB* v. *Katz*, 369 U. S. 736; *NLRB* v. *Crompton-Highland Mills, Inc.*, 337 U. S. 217.

[8] § 301, Labor Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. § 185 (1964 ed.).

[9] The Court of Appeals in this case relied upon its previous decision in *Square D Co.* v. *NLRB*, 332 F. 2d 300. But *Square D* involved a collective agreement that provided for arbitration. See Note, Use of an Arbitration Clause, 41 Ind. L. J. 455, 469 (1966).

[10] See also *Cloverleaf Div. of Adams Dairy Co.*, 147 N. L. R. B. 1410, 1416 (1964), where the Board made the following observation to justify, in part, its decision to construe a labor contract in the course of an unfair labor practice proceeding:

". . . it affirmatively appears that neither party has even so much as sought to invoke arbitration. Nor is this a case involving an alleged unfair labor practice, the existence of which turns primarily

The respondent's argument rests primarily upon the legislative history of the 1947 amendments to the National Labor Relations Act. It is said that the rejection by Congress of a bill which would have given the Board unfair labor practice jurisdiction over all breaches of collective bargaining agreements shows that the Board is without power to decide any case involving the interpretation of a labor contract. We do not draw that inference from this legislative history.

When Congress determined that the Board should not have general jurisdiction over all alleged violations of collective bargaining agreements [11] and that such matters should be placed within the jurisdiction of the courts,[12] it was acting upon a principle which this Court had already recognized:

> "The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them."

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on an interpretation of specific contractual provisions, unquestionably encompassed by the contract's arbitration provisions, and coming to us in a context that makes it reasonably probable that arbitration settlement of the contract dispute would also put at rest the unfair labor practice controversy in a manner sufficient to effectuate the policies of the Act." (Footnotes omitted.)

Cf. *Spielberg Mfg. Co.*, 112 N. L. R. B. 1080 (1955).

[11] An earlier version of the Senate bill contained the following provision:

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

. . . . . .

"(6) to violate the terms of a collective-bargaining agreement or the terms of an agreement to submit a labor dispute to arbitration: . . . ."

Section 8 (b) (5) of the same bill imposed a similar limitation upon labor organizations. S. 1126, 80th Cong., 1st Sess., 1 Legis. History of LMRA 109–111, 114. Neither of these provisions was in the bill enacted into law.

[12] § 301, Labor Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. § 185 (1964 ed.).

Terminal Railroad Assn. v. *Brotherhood of Railroad Trainmen*, 318 U. S. 1, 6. To have conferred upon the National Labor Relations Board generalized power to determine the rights of parties under all collective agreements would have been a step toward governmental regulation of the terms of those agreements. We view Congress' decision not to give the Board that broad power as a refusal to take this step.[11]

But in this case the Board has not construed a labor agreement to determine the extent of the contractual rights which were given the union by the employer. It has not imposed its own view of what the terms and conditions of the labor agreement should be. It has done no more than merely enforce a statutory right which Congress considered necessary to allow labor and management to get on with the process of reaching fair terms and conditions of employment—"to provide a means by which agreement may be reached." The Board's interpretation went only so far as was necessary to determine that the union did not agree to give up these statutory safeguards. Thus, the Board, in necessarily construing a labor agreement to decide this unfair labor practice case, has not exceeded the jurisdiction laid out for it by Congress.

This conclusion is re-enforced by previous judicial recognition that a contractual defense does not divest the Labor Board of jurisdiction. For example, in *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270, the legality of an employer's refusal to reinstate strikers was based upon

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[11] Congress was also concerned with the possibility of conflicting decisions that would result from placing all questions of contract interpretation before both the Board and the courts. See 93 Cong. Rec. 4153, 2 Legis. History of LMRA 1043 (remarks of Senator Murray); 93 Cong. Rec. 6600, 2 Legis. History of LMRA 1539. But such a possibility does not arise in a case like the present one, since courts have no jurisdiction to enforce the union's statutory rights under §§ 8 (a)(5) and (1).

the Board's construction of a "no strike" clause in the labor agreement, which the employer contended allowed him to refuse to take back workers who had walked out in protest over his unfair labor practice. The strikers applied to the Board for reinstatement and back pay. In giving the requested relief, the Board was forced to construe the scope of the "no strike" clause. This Court, in affirming, stressed that the whole case turned "upon the proper interpretation of the particular contract . . . ." 350 U. S., at 279. Thus, *Mastro Plastics* stands squarely against the respondent's theory as to the Board's lack of power in the present case.[14]

If the Board in a case like this had no jurisdiction to consider a collective agreement prior to an authoritative construction by the courts, labor organizations would face inordinate delays in obtaining vindication of their statutory rights. Where, as here, the parties have not provided for arbitration, the union would have to institute a court action to determine the applicability of the premium pay provision of the collective bargaining agreement.[15] If it succeeded in court, the union would then

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[14] In *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270, the employer was charged with a violation of §§ 8 (a) (1), (2) and (3), and not with a failure to bargain. But nothing is suggested that would justify distinguishing the case on that ground.

[15] The precise nature of the union's case in court is not readily apparent. If damages for breach of contract were sought, the union would have difficulty in establishing the amount of injury caused by respondent's action. For the real injury in this case is to the union's status as bargaining representative, and it would be difficult to translate such damage into dollars and cents. If an injunction were sought to vindicate the union's contractual rights, the problem of the applicability of the Norris-LaGuardia Act would have to be faced. A federal injunction issuing from a court with § 301 jurisdiction might be barred by § 7 of that Act. See *International Union of Electrical Workers* v. *General Electric Co.*, 341 F. 2d 571 (C. A. 2d Cir.); *Local No. 861* v. *Stone & Webster Corp.*, 163 F. Supp. 894 (D. C. W. D. La.). Cf. *Sinclair Refining Co.* v. *Atkinson*,

have to go back to the Labor Board to begin an unfair labor practice proceeding. It is not unlikely that this would add years to the already lengthy period required to gain relief from the Board.[18] Congress cannot have intended to place such obstacles in the way of the Board's effective enforcement of statutory duties. For in the labor field, as in few others, time is crucially important in obtaining relief. *Amalgamated Clothing Workers* v. *Richman Bros. Co.*, 348 U. S. 511, 526 (dissenting opinion).

The legislative history of the Labor Act, the precedent interpreting it, and the interest of its efficient administration thus all lead to the conclusion that the Board had jurisdiction to deal with the unfair labor practice charge in this case. We hold that the Court of Appeals was in error in deciding to the contrary.

The remaining question, not reached by the Court of Appeals, is whether the Board was wrong in concluding that the contested provision in the collective agreement gave the respondent no unilateral right to institute its premium pay plan. In reaching this conclusion, the Board relied upon its experience with labor relations and the Act's clear emphasis upon the protection of free collective bargaining. We cannot disapprove of the Board's approach. For the law of labor agreements cannot be based upon abstract definitions unrelated to the context

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370 U. S. 195; *Publishers' Assn.* v. *New York Mailers' Union*, 317 F. 2d 624 (C. A. 2d Cir.), cert. granted, 375 U. S. 901, judgment vacated in part for dismissal as moot, 376 U. S. 775. Whether a state injunction might be similarly barred in suits governed by federal labor law, *Teamsters Local* v. *Lucas Flour Co.*, 369 U. S. 95, is an open question. See *Charles Dowd Box Co.* v. *Courtney*, 368 U. S. 502, 514, n. 8. Thus, it may be that the only remedy in court which would be available to the union would be a suit for a declaratory judgment, assuming such a suit in these circumstances would be maintainable under state or federal law.

[18] The instant charge, for example, was filed July 31, 1963.

in which the parties bargained and the basic regulatory scheme underlying that context. See Cox, The Legal Nature of Collective Bargaining Agreements, 57 Mich. L. Rev. 1 (1958). Nor can we say that the Board was wrong in holding that the union had not foregone its statutory right to bargain about the pay plan inaugurated by the respondent. For the disputed contract provision referred to increases for "particular employee[s]," not groups of workers. And there was nothing in it to suggest that the carefully worked out wage differentials for various members of the glue spreader crew could be invalidated by the respondent's decision to pay all members of the crew the same wage.[17]

The judgment is accordingly reversed and the case is remanded to the Court of Appeals with directions to enforce the Board's order.

Reversed and remanded.

[17] The respondent points to two other labor contracts in its area to support its version of the provision here in question, but those agreements, even if relevant, fall short of substantiating its position. In one, a premium was paid to members of two-man crews who accomplished prescribed production goals. But the respondent does not show that this premium leveled a wage differential set up by the collective bargaining agreement. In the other, a lumber company's head sawyer received an hourly bonus if the plant exceeded a certain monthly output.